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Is the Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law? A Reply to Graffin and Mavronicola

Steven Greer¹

ABSTRACT

In two articles published in this journal I argued that the prohibition against torture, cruel, inhuman and degrading treatment is not genuinely absolute in international human rights law as almost universally supposed. Neil Graffin and Natasa Mavronicola have recently offered critiques. But each, regrettably, suffers from three fatal defects: most of my arguments are simply ignored, I’ve already thoroughly explored every single one of those addressed, and their attempts to concede certain elements of my case in order to defend a narrower conception of absoluteness fails. What follows is a brief response to set the record straight.

Keywords: international human rights law, ‘absolute’ prohibition of torture, cruel, inhuman or degrading treatment, competing ‘absolute’ rights, *Gäfgen v Germany*.

1. INTRODUCTION

Had it been made in an academic context, Oscar Wilde’s famous quip – ‘the only thing worse than being talked about is not being talked about’ – might have been rendered: ‘the only thing worse than being criticised is being ignored’. I’m grateful, therefore, to Mavronicola and Graffin for taking the time and trouble to reply² to my recent contributions to the debate about the absoluteness of the prohibition against torture, cruel, inhuman and degrading treatment

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² N. Graffin, ‘*Gäfgen v Germany*, the Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 681; N. Mavronicola, ‘Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 479.

(TCIDT) in international human rights law.³ But regrettably their earnest and well-intentioned contributions suffer from three fundamental defects – most of my arguments are simply ignored, I’ve already thoroughly explored every single one of those they address, and their attempts to defend a narrower conception of absoluteness by conceding certain elements of my case ultimately fails. Their own-goal interventions, nevertheless, provide a welcome opportunity for the weaknesses in the absolutist case to be further exposed.

Let me begin by reminding readers of my motives in this debate. For many years I stood in front of numerous human rights classes retailing the absolutist orthodoxy. Then came the *Gäfgen* case. German police officers who had threatened Magnus Gäfgen, a child kidnapper, with torture unless he told them where he’d taken his victim, Jakob von Metzler, were prosecuted, tried and received suspended fines for the offences involved. Though the leniency of the punishment called the absoluteness of the prohibition into question, to me this seemed a sensible outcome. But I was greatly troubled by the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR). Ignoring Jakob’s right not to suffer TCIDT as a result of the kidnapping, and dismissing the risk that he might have been dying as a result, the Court held that only a heavy sentence would have been appropriate for the violation of Gäfgen’s ‘absolute’ rights under Article 3 ECHR not to be subject to TCIDT. Frankly, if this is where the human rights ideal inescapably takes us, I would want nothing further to do with it. But then I realised that the source of my disquiet lay in some widely-ignored, but fundamental, problems with the concept of absoluteness in this context. Although, as I’ve repeatedly said, there is ultimately no completely satisfactory solution to the legal or moral dilemmas involved, in my opinion the challenges – including those presented by at least certain versions of ‘the ticking bomb scenario’ – should be more coherently, honestly and squarely addressed. Let me reprise my case once again before considering the critiques offered by Graffin and Mavronicola.

³ S. Greer, ‘Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gäfgen* case’ (2011) 11 *Human Rights Law Review* 67-89 and ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?’ (2015) 15 *Human Rights Law Review* 101-137.

2. THE CASE AGAINST THE ABSOLUTENESS OF THE PROHIBITION IN INTERNATIONAL HUMAN RIGHTS LAW

No credible contributor to the ‘absoluteness debate’ argues that officials should be entitled to subject those under their control to TCIDT as a matter of routine fully sanctioned by law. The only area of real controversy is whether any exceptions can be identified in which such conduct could ever be justified or excused, if so what legal status it would have, and what should be done with those who resort to it in such circumstances. According to one view, the suffering of a kidnap victim or the many likely to be killed or injured when a ticking bomb explodes, matters less than guaranteeing that the perpetrator is protected even from mild suffering which, had it been inflicted, might have averted the calamity. The other view is that, since the prohibition against TCIDT derives from the moral impulse to eliminate, or at least reduce, all forms of deliberately occasioned and unjustified harm, it is difficult to see why the culprit’s right to be spared even threats must always and invariably outweigh the injury and death caused by a kidnapping or exploding time bomb.

While this dilemma is certainly moral, it cannot be avoided in international human rights law either. Upon closer examination it turns out that the absoluteness of the prohibition in this context is, in fact, based on a problematic moral choice masquerading as an objective and inescapable legal imperative, typically supported and defended by bald assertion, blind faith, intellectual tunnel vision, and by appeals to authority rather than to reason. The core problem is that absoluteness is not an express, inherent, self-evident, or necessary feature of the formally unqualified international provisions in question and the fact that no limitations are specified is not a good enough reason to regard them, and the rights and duties they imply, as absolute. For one thing, implied rights limited by implicit exceptions are uncontroversially derived from other formally unqualified human rights-related provisions. Many subtle and sophisticated arguments have been advanced by philosophers for and against the concept of absolute rights, and about which deserve this status. Yet, rather than engaging with these, and coupled with an unwillingness to imagine the possibility of any legitimate exception, judges, lawyers and jurists have instead simply assumed that absolute rights and obligations must be derived from the relevant international legal provisions because no limitations are expressed.

However, the inescapable fact is that, when two instances of the same ‘absolute right’ come into conflict, as the *Gäfgen* case clearly indicates they can and do, it is logically impossible for

each to be equally absolute. In such circumstances, one must inevitably take precedence over the other, with the one which does providing an exception to, or a limitation upon, the other. The key questions then become: which is which and why? When such a dilemma arises no morally or legally watertight solution can be found. But the only route to the least objectionable outcome is that the ‘lesser of the two evils’ should prevail, determined by an accommodation between the competing prohibitions, interests, and rights which best expresses their underlying rationale. Non-absolute interpretations of the prohibition against TCIDT are not only possible, but in fact formally and expressly underpin similar provisions in some celebrated national human rights instruments including the Canadian Charter of Rights and Freedoms 1982, the New Zealand Bill of Rights Act 1990 and the South African Bill of Rights 1996. This raises the following questions: which formulation—absolute or non-absolute—is more appropriate and why? The claim that the obligations and rights under consideration are ‘absolute in principle’ but ‘relative in application’ is also unconvincing since it facilitates the rebranding of a legitimate exception as a mere failure to satisfy threshold criteria, thereby misleadingly appearing to leave their absolute status intact. Nor does it follow, because the term ‘inhuman or degrading’ treatment (with ‘cruel’ sometimes added) is typically included in the same provision of any given international human rights instrument prohibiting torture, that each of these very different forms of harmful conduct must necessarily share the same status.

It is also difficult to sustain the view that the rights and obligations in question are legally absolute, but that the *Gäfgen* case may constitute a rare moral exception, or that it suggests merely an argument about what the law ought to be rather than what it is. Since human rights norms gain their legal authority because of their moral weight, without minimal moral credibility it is difficult to see what legal status they can possibly have. The fact that Jakob was already dead when Gäfgen was threatened with torture, and that the police may not have exhausted all options short of the threat, are also contingent but not necessary features of the moral and legal dilemmas the case presents. It could easily have been otherwise and, at the material time, only Gäfgen knew Jakob’s real fate. Nor is it appropriate to frame the conflict exclusively in terms of the kidnap victim’s right to life and the suspected kidnapper’s right not to be threatened with torture since there may well be a conflict between the latter and the kidnap victim’s right not to suffer whatever TCIDT the kidnapping itself may be causing. It has also yet to be satisfactorily explained why, provided no more force than absolutely necessary is used, police officers may lawfully shoot to kill hostage-takers and not breach their human rights, yet causing limited anxiety by threatening torture for the purpose of rescuing kidnap

victims or preventing a ticking bomb from exploding must be severely punished in all circumstances without exception. Claiming that the threat of torture violates ‘dignity’ but that shooting to kill does not, begs a simple question to which there is no convincing answer – why? The claim that the prohibition in question is absolute against agents of the state but not against private parties is also unsustainable for two main reasons: if true, it would constitute an acknowledgement that it is, in fact, subject to implicit exceptions; and it would also fail to provide a solution to the hypothetical problem that if *Gäfgen* had been a rogue police officer, there would have been a conflict between two competing sets of Article 3 rights (his and Jakob’s) each against the state. Privileging the negative obligation held by the police to refrain from mistreating suspects over their positive obligation to rescue victims of crime, or framing the issue in terms of ‘inherent rights and wrongs’ rather than absolute rights and obligations, also merely recasts rather than resolves the dilemma. Convincing reasons independent of these considerations need to be found to justify this order of priorities in all circumstances. None has yet been provided. It does not follow either that, because the implications of the *Gäfgen* case are consequence-sensitive, a utilitarian political morality is necessarily invoked since the human rights ideal itself prioritises the pursuit of certain outcomes over others.

In all probability the *Gäfgen* case is a unique aberration. However, its importance lies less in debating what the solution to the actual facts should have been, and more in seeking to determine what kind of norms should apply in a range of circumstances, including where the mere threat of mistreatment had resulted in Jakob’s life being saved. It also shows, for example, how a conceptually flawed interpretation of a fundamental norm in international human rights law can lead to substantive injustice in hitherto unforeseen circumstances. There are no credible grounds either for fearing law enforcement will slither down a slippery slope towards the more routine official use of TCIDT unless the absoluteness of the prohibition is rigorously upheld. For one thing, neither the slippery slope nor the ‘noble lie’ (affirming that the prohibition is absolute when we know it isn’t) have been encountered in Canada, New Zealand or South Africa where the prohibition and rights in question are expressly non-absolute. Nor is it clear why the absence of an absolute prohibition on the official use of lethal force does not also create the risk of a slide down a different slippery slope. It is also not clear why the potential unreliability of information obtained in *Gäfgen*-type circumstances should be regarded as less amenable to morally responsible risk management than that posed by any other type the veracity of which cannot be guaranteed. The *Gäfgen* case also illustrates how attempting to solve the challenges it raises through legal formalism and legal logic alone, risks attributing

transcendent, omnipotent, supra-human qualities to what are no more than human-made standards in order to avoid making intuitively sound, emotionally convincing, and rationally defensible, moral choices to resolve intractable normative dilemmas.

It is more important, therefore, that those with control over others should understand that credible allegations of TCIDT should result in prosecution and, if proven, are likely to lead to punishment. There is no need to invoke the concept of absoluteness at all to make this message clear. It would have been wiser and more credible, therefore, if, prior to the *Gäfgen* case, the eminent legal authorities which have so repeatedly and unreflectively affirmed the absoluteness of the prohibition, had avoided the term ‘absolute’ altogether and instead had simply stated that it is difficult to imagine any circumstances in which TCIDT could be justified. This would have sent, and would continue to send, an appropriate message to officials and others entirely consistent with the implications of the *Gäfgen* case: any resort to TCIDT will expose those responsible to the prospect of potentially severe punishment. It is open to further debate whether a defence of necessity in *Gäfgen*-type circumstances could ever negate either criminal liability and/or moral culpability rather than merely mitigating punishment. But, if the threat results in a life or lives being saved, it is difficult to see why the police officers involved deserve to be punished at all, let alone severely as the judgment of the majority of the Grand Chamber logically implies. Rather than repeating the empty mantra of ‘absoluteness’, the challenge is to specify conditions which limit any exception to the most extreme circumstances. Hiding behind it is merely an evasion of the responsibility inherent in a full commitment to human rights to decide for sound reasons, where suffering cannot be avoided, whose matters most—suspects, victims, and potential victims included.

3. THE CRITIQUES

Ignoring most of this, Mavronicola’s critique rests upon four central claims: the prohibition is self-evidently and necessarily absolute because no limits are specified; a proper appreciation of the distinction between negative and positive obligations reveals that there is no conflict of rights in *Gäfgen*-type circumstances; shooting to kill hostage-takers in order to rescue hostages may sometimes be justified under international human rights law but never threatening them with torture to achieve the same purpose because the latter involves a violation of dignity and agency while the former does not; affirming the absoluteness of the prohibition in international human rights law does not ‘close off critical engagement’ with debate about the meaning of

TCIDT, or with wider issues including the question of individual criminal liability for violation and the ‘ticking bomb scenario’. Graffin is primarily concerned with contesting the lenient sentences the police officers in the *Gäfgen* case in fact received. But he also considers the slippery slope argument and, like Mavronicola, the formal character of the prohibition and rights in question, conflicts of rights, and the positive and negative obligations involved.

A. The prohibition is absolute because no exceptions are specified

Both Graffin and Mavronicola claim that, as the former puts it, ‘the right’ in Article 3 ECHR ‘is framed in absolute terms.’⁴ This is quite simply wrong. Nor, in spite of Mavronicola’s professed difficulties with the terms, is there any ambiguity about what ‘inherent legal necessity’ or the risk of ascribing a transcendent, omnipotent, supra-human quality to the prohibition (what some authors refer to as ‘legal fetishism’) mean. The issue is crystal clear. Article 3, and other canonical formulations, are framed as *imperatives* or *prohibitions* and do not in fact contain any express rights at all. Nor are they *expressly absolute*. They are merely *formally unqualified*. In other words, no exceptions are expressly specified. But, it is well recognised that any rights which may derive from a formally unqualified prohibition may have *implied exceptions*. To discover if there are any, and if so what they are, requires the exercise of judgment and reason, stemming from a proper understanding of how all relevant considerations can be reconciled, and not simply bald assertion as was the case for absoluteness in this context until the recent debate. The alleged absolute status of Article 3 is, therefore, a matter of choice and attribution not an inherent and inescapable feature of the provision itself. This is further demonstrated by the fact, which both Graffin and Mavronicola completely ignore, that the text of Article 3 which eventually found its way into the final draft of the ECHR, was a compromise between expressly limited and expressly absolute versions. Mavronicola’s claim – that denying the inescapable absoluteness of the prohibition ‘attacks the foundational core of the legal protection of human rights as enshrined in the ECHR and other instruments’⁵ – is also wide of the mark, not least because absoluteness is patently not inescapable.

Graffin also undermines the absolutist case by conceding that: ‘Although Article 3 is framed in absolute terms, there is a moral judgment to be made to decide when something is acceptable

⁴ Graffin, *supra* n 2, at 685, 686.

⁵ Mavronicola, *supra* n 2, at 493.

or not for that “absoluteness” to be triggered’.⁶ But, if it has to be ‘triggered’, it cannot be genuinely absolute because the occasions in which it is not triggered constitute exceptions to the relevant prohibition and rights.

B. Conflicts of rights and positive and negative obligations

In spite of having explored the issue at length in my 2015 article, according to Mavronicola, I, nevertheless, fail to understand the distinction between the state’s negative obligation to refrain from subjecting those under its control to TCIDT, and its positive obligation to take reasonable steps to protect those within its jurisdiction from suffering the same fate at the hands of someone else. As a result, I have mistakenly concluded that a conflict arises in the *Gäfgen* case between Jakob’s right not to suffer TCIDT as a result of the kidnapping, and Gäfgen’s right not to suffer the inhuman treatment of being threatened with torture for failing to disclose Jakob’s whereabouts thereby obstructing rescue. Graffin acknowledges that ‘absolute’ rights can conflict and that this occurred in the *Gäfgen* case but offers no reasons for preferring Gäfgen’s over Jakob’s that haven’t already been thoroughly discredited.

According to Mavronicola, there is no such conflict because each obligation is owed by different parties. In a nutshell my response to this criticism is similar to the one offered in the section above. Mavronicola’s view is a matter of interpretation and attribution rather than necessity, legal or otherwise. I readily admit that the state has a limited legal obligation to protect those within its jurisdiction from inflicting TCIDT upon each other and that it also has a much more compelling legal obligation not to mistreat those under the control of its own agents. In fact, as I acknowledge in the 2015 article, the latter is *virtually* absolute. But the core question is whether it applies even in unique and extreme circumstances such as those presented by the *Gäfgen* case. For all the reasons already given, I say that it does not and should not. Mavronicola claims that the ‘positive obligations to take all *reasonable* measures, including operational measures, to protect Jakob would not include a duty to act in a way which is absolutely prohibited.’⁷ But this is a circular argument which assumes the absoluteness of the prohibition in order to demonstrate its absoluteness. Arguments of a similarly circular kind

⁶ Graffin, *supra* n 2 at 686.

⁷ Mavronicola, *supra* n 2 at 484, italics in original.

also appear in the following paragraph on the same page, with reference to the state's responsibilities had Gäfgen been a rogue police officer, and in other parts of her critique.⁸

C. Shooting to kill hostage-takers and harming those under official control

Mavronicola also fails to provide a convincing refutation of what she claims is my 'strongest case', that there is no good reason why shooting, and killing or permanently disabling, a hostage-taker to rescue a hostage may be permitted as a matter of international human rights law, but threatening them with torture can never be. According to her, the reason is that the former does not involve a violation of dignity or agency but the latter does. Frankly I simply don't see it. In my view being severely disabled as a result of a gunshot intended to kill is a much more serious infringement of dignity and agency than the ten minutes of anxiety Gäfgen experienced as a result of having been threatened with torture. Each can also be justified depending upon the circumstances. Graffin also makes the telling observation that there are numerous occasions when inflicting pain or suffering upon those under official control can be justified, eg the imposition of solitary confinement as a proportionate punishment to breaches of custodial norms or the forced removal of a recalcitrant prisoner from his cell.⁹ But he fails to appreciate their full significance: if these kinds of suffering can be lawfully and morally inflicted in pursuit of the goals in question, why can the threat of torture never be used to rescue a kidnap victim or to prevent a potentially fatal explosion? As Graffin argues, the powerlessness of suspects in police interviews, and their right not to incriminate themselves, also provide compelling reasons for the prohibition of ill-treatment. But for these considerations to be conclusive requires further argument which he fails to supply.

D. What to do with those who infringe the prohibition?

Both Graffin and Mavronicola make fatal concessions to the case against the absoluteness of the prohibition by accepting that those who breach it may be entitled to leniency in punishment. Graffin's position is, however, less than crystal clear because, like the majority of the Grand Chamber in the *Gäfgen* case, he castigates the German courts for the lenient punishment the

⁸ Ibid at 485, 488, 495; See also Graffin, *supra* n 2 at 693, 699.

⁹ Graffin, *supra* n 2 at 687-9.

police officers received, but also argues that their sentences should have been proportionate and mitigated by the facts, yet without saying what precisely this would entail.

For her part Mavronicola claims that the absolute character of the legal prohibition does not ‘close off critical engagement’¹⁰ about the meaning of core terms in the debate, or with wider moral issues, including about criminal culpability for violation including in the ticking bomb scenario. Regrettably this adds further confusion to the absolutist case and requires several issues to be disentangled. First, I stand accused of having adopted an overly inclusive definition of absoluteness in order to set it up as a straw man to be easily knocked over. This is untrue. As with any concept, ‘absolute’ can be defined in various ways. But, at root, I have consistently endorsed the ordinary dictionary definition as employed in international human rights law particularly by the ECtHR – ‘not subject to any exceptions in any circumstances’. Mavronicola also proposes distinguishing ‘between the delimitation of the prohibition of torture and CIDT through the interpretation of its terms, and the application of exceptions, qualifications or derogations to the prohibition of torture and CIDT.’¹¹ Since no account is provided to explain how an interpretative ‘delimitation’ does not amount to an exception, this appears to be a distinction without a difference. Mavronicola also fails to show why, because TCIDT are typically found together in the same provisions of international human rights law, they unquestionably deserve the same status. Her case is further undermined here by the same kind of circular argument that appears elsewhere in the critique.

I have also been accused of conflating ‘the absolute character of the prohibition of torture and CIDT *as it applies to the State under international human rights law* with the contours of the criminal culpability, excusability and shades thereof of *individuals*’.¹² Yet this is exactly what the majority of the Grand Chamber did in the *Gäfgen* case when it held, in effect, that any leniency in punishing breaches of the prohibition would compromise its absoluteness, including where threatening a kidnapper with torture would have saved the life of a kidnapped child. In an attempt to avoid this result, Mavronicola seeks to show that ‘any duty to punish individuals is not an essential parameter of the absoluteness of the prohibition in international human rights law, a prohibition which holds *States* liable for human rights violations.’¹³ Yet,

¹⁰ Mavronicola, *supra* n 2 at 479, 480.

¹¹ *Ibid* at 493.

¹² *Ibid* at 481, italics in original.

¹³ *Ibid* at 488, italics in original.

for two main reasons, the endeavour fails. First, it is difficult to see in what sense a state is ‘held liable’ where its own agents escape the penalty appropriate for violating an ‘absolute’ right. Second, one of the procedural obligations under Article 3 ECHR is to ensure that breaches are effectively sanctioned. The absoluteness of the prohibition becomes a hollow fiction where this is lenient because it suggests the prohibited conduct is less objectionable in some circumstances than in others. Whatever anyone might say, degrading treatment which barely crosses the Article 3 ECHR threshold is clearly not as unacceptable, legally or morally, as torture.

However, since the prohibition is not genuinely absolute, the question of what to do with those who breach it does indeed need to be considered separately. In order to ensure public accountability, there should be a prosecution in all cases. Severe punishment will generally be merited. But in rare circumstances it should be lenient. In other, even rarer cases, especially where the mere threat saves a life or lives, it may be appropriate not to punish at all. Mavronicola dismisses the latter as involving a ‘dash of moral luck’¹⁴ as if this were obviously an inappropriate consideration. Yet ‘luck’ and ‘chance’ pervade law as they do life. A negligent motorist will, for example, not be liable for causing an accident, if the quick-thinking driver of an on-coming vehicle ‘luckily’ swerves to avoid what would otherwise have been a fatal head-on collision. Nor will the offence of causing death by dangerous driving have been committed if, against the odds, the victim ‘luckily’ survives in spite of life-threatening injuries.

I also stand accused of confusing absoluteness as matters of law and morality. Yet, as already indicated, both the 2011 and 2015 articles are consistently concerned with what absoluteness means *as a matter of international human rights law*. The clue is, for example, in the title of the latter. But as I have also argued, the distinction between law and morality is far from watertight because the status of the legal prohibition is a matter of extra-legal interpretive choice from which morality cannot credibly be excluded. Moreover, since legal human rights norms are simultaneously political and moral (with some economic and cultural besides) any genuine norm of international human rights law will also inevitably possess at least minimal moral content.

¹⁴ Ibid at 482.

4. CONCLUSION

Some may think this debate is divorced from reality. After all it is agreed on all sides that the prohibition against TCIDT should be observed in ('strictly' or 'virtually') all circumstances and the occasions upon which any doubt may arise are very remote indeed. However, no one could seriously deny that the treatment a suspected kidnapper or bomber should receive from law enforcement officials seeking to rescue a kidnap victim or prevent a terrorist outrage are issues of considerable moral and legal importance.

The key to understanding the prohibition, rights and duties in international human rights law lies in appreciating the issues arising on two principal dimensions: the formal and the moral. As for the former, the relevant texts, eg Article 3 ECHR, are framed as negative imperatives or prohibitions which are not expressly absolute, but merely formally unqualified. Indeed, the text of Article 3 ECHR was a compromise between expressly absolute and expressly limited alternatives. Moreover, since they do not contain any express rights at all, any rights to which they may give rise are, therefore, implicit rather than express. It is widely recognised that rights implied by formally unqualified imperatives or prohibitions may be subject to implicit exceptions. It is also logically impossible for each of two competing instances of the same 'absolute' right to be equally absolute. One must take precedence over the other with the former becoming an exception to the latter. To find out whether the rights in question are subject to implied exceptions, and to determine which of two competing 'absolute' rights should prevail over the other and in what circumstances, requires moral judgment rather than the kind of bald assertion, supported by appeals to authority, which underpinned the absolutist case until the current debate began. This inescapably involves a quest for the least bad outcome which best expresses the underlying rationale of the prohibition, rights and obligations and also maximises their effectiveness.

It is also agreed on all sides that ill-treatment of suspects in police custody, and in other contexts, should, as Graffin puts it, be 'eliminated in so far as it is possible to do so'.¹⁵ The only matter for debate is how 'far it is possible to do so'. Paradoxically, insisting upon the absoluteness of the prohibition in certain kidnapping and ticking bomb scenarios, weakens rather than strengthens its efficacy, because in these circumstances, it permits the rights of

¹⁵ Graffin, *supra* n 2 at 686.

innocent victims actually suffering, or about to suffer torture, to be subordinated to the right of culprits to avoid considerably less suffering in order to stop or prevent it. The greater suffering therefore occurs, not only because of the acts of those directly responsible for the kidnapping or the bomb, but also because significantly lesser suffering was not inflicted upon them which, had it been, would have avoided the greater suffering of their victims. As a result of the recent debate, it is now also clear that ‘absoluteness’ means something much more limited than it seemed at the outset. Graffin, for example, thinks it is ‘triggered’ only in some circumstances but not others, while Mavronicola speculates about the possibility of ‘delimiting the prohibition’ by interpreting its terms without its absoluteness being affected. Each also flirts with tolerating lenient punishment for infringement, believing that this also has no effect upon the absolute status of the prohibition. Yet all of these concessions inescapably imply that some infringements are less serious, more justified, and, therefore, less ‘absolutely’ prohibited than others.

In all probability, as Mavronicola predicts and advocates, many including the ECtHR itself, will simply ignore the ‘anti-absolutist’ case and continue to affirm the orthodoxy regardless. Too much assertion, though very much less thought and argument, have certainly been invested in it over the past half century or so for it to be recanted without significant loss of face. But the problem with such a head-in-the-sand attitude is that it risks causing further damage, not only to the credibility of the ECtHR, but to the human rights ideal itself. A much more credible alternative would simply be to drop the term ‘absolute’ from the jurisprudence and the discourse altogether. There is no need whatsoever for it to be invoked in order to send a clear message to those with control over others that credible allegations of TCIDT should result in prosecution and, if proven, are likely to lead to potentially severe punishment. Whether, in exceptional circumstances, a defence of necessity could ever absolve those responsible from either criminal liability and/or moral culpability rather than merely mitigating punishment, is a matter for further discussion. While hard core absolutists are unlikely to change their minds, I’m confident that most who have yet to make up theirs will see the strength of the case for *virtual* absoluteness. After all, in addition to all the arguments already offered, it also chimes so much better than the case for *strict* absoluteness with the common-sense intuition that, at least in some circumstances, saving the lives of those who would otherwise suffer as a result of kidnapping or an exploding time bomb, matters more than protecting the kidnapper or bomber from the threat of TCIDT in order to avert it. However, whatever anyone thinks, this particular genie is now out of the bottle and nobody, including Graffin and Mavronicola, has

yet found a way of putting it back in. I doubt if anyone ever will. But if they can, I will gladly re-join the absolutist cause.